NO. 21,174

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICOLE EUGENIE MARIE FARGUES,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

CECIL F. POOLE
United States Attorney

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: 556-7633

Attorneys for Respondent

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AUTHORITIES CITED

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JURISDICTION

Petitioner has filed her petition pursuant to the authority of 8 USC 1105(a), Section 106(a) of the Immigration and Nationality Act, for review of the final order of deportation of February 18, 1966 (R., P. 32). The appeal to the Board of Immigration Appeals was dismissed on July 7, 1966. The petition was filed on August 17, 1966, within six months of the dismissal of the appeal.

Foti v. INS
375 US 217

STATEMENT OF THE CASE

Petitioner is a native and citizen of France, age 33 as of May, 1966. She married Louis Fargues in France. She entered Canada at Montreal with her husband on September 27, 1958 (R., Exhibit 2). She left her husband and son in July, 1964, and entered the United States on or about July 20, 1964, and came to California. She met Gordon Leon Kay in September, 1964. She was returned to Canada at government expense on January 14, 1965. She last entered the United States at Sumas, Washington, on or about June 20, 1965, without documents and without inspection. She claims to have entered with Gordon Kay by automobile about 11 p. m. (R., pp 44-45). A child was born at Lynnwood, Washington, on August 2, 1965, and was named Daniel Lee Kay. Gordon Kay is the father.

An action for divorce against the husband, Louis Fargues, was filed in the Superior Court at Fresno, California, and on March 2, 1966 an interlocutory decree was obtained (R., p. 27). A final decree was obtained on or about January 4, 1967, and petitioner and Gordon Leon Kay were married on January 24, 1967, in Fresno County.

Deportation proceedings were instituted against petitioner by the issuance of an Order to Show Cause, on February 10, 1966 (R., Exhibit #1, p. 55). A hearing in deportation proceedings was held at Fresno, California, on February 18, 1966. By decision dated February 18, 1966, the Special Inquiry Officer found petitioner deportable on the charge in the Order to Show Cause, to-wit, entry without inspection, Section 241(a)(2) of the Immigration and Nationality Act, on or about June 20, 1965.

Petitioner appealed to the Board of Immigration Appeals. By order dated July 7, 1966

the appeal was dismissed. A copy of the Order of the Board of Immigration Appeals is attached hereto as Appendix I.

STATUTES

§ 241(a)(2) 8 USC 1251(a)(2)

> "(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;"

§ 245 8 USC 1255

> "(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, * * * "

§ 291 8 USC 1361

> " * * * In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, * * * "

8 CFR 242.14(a) (January 11, 1967)

> "§ 242.14 Evidence.
> (a) Sufficiency. No deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."

ERRORS CHARGED

1. Investigation officer of respondent erred in taking a statement from petitioner.

2. Hearing officer erred in allowing affidavit in evidence.

3. Hearing officer erred by taking the statement of petitioner without informing her of the privilege against self-incrimination.

4. Hearing officer erred in proceeding with the hearing when petitioner was not represented by counsel.

5. Board of Immigration Appeals erred in upholding finding of the Special Inquiry Officer.

QUESTIONS PRESENTED

1. Was petitioner accorded due process and a fair hearing?

2. Has respondent established deportability by clear, unequivocal and convincing evidence?

ARGUMENT

Petitioner was accorded due process and a fair hearing.

1. Deportation proceedings are civil in nature and not criminal.

Fong Yue Ting v. US
149 US 698

U. S. ex rel Bilokumsky v. Tod
263 US 149

Harisiades v. Shaughnessy
342 US 580

Galvan v. Press
347 US 522

Marcello v. Bonds
349 US 302

Mulcahy v. Catalanotte
353 US 692

Fuentes-Torres v. INS
344 F.2d 911;
cert. den. Oct. 11, 1965,
382 US 846

Ben Huie v. INS (9 Cir.)
349 F.2d 1014

MacLeod v. INS (9 Cir.)
327 F.2d 453

Nason v. INS (2 Cir.)
No. 30623, January 10, 1967

Ah Chiu Pang v. INS (3 Cir.)
No. 15841,
decided October 28, 1966

2. Section 291 of the Immigration and Nationality Act, 8 USC 1361, provides:

> "In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, * * * "

The sworn statement, Exhibit 2 of the Record, was properly introduced in evidence. There is nothing in the record indicating that the statement was induced by coercion, duress, or other improper action on the part of the immigration officer.

Ben Huie v. INS, supra

Nason v. INS, supra

Ah Chiu Pang v. INS, supra

4. Petitioner's deportability has been determined by clear, unequivocal and convincing evidence. Section 242(b)(4), 8 USC 1252(b)(4) specifies:

> "(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

The Supreme Court, in its decision in Woodby v. INS, 17 L.Ed 2nd 363, 385 US_____, held as follows:

> "We hold that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true."

Footnote 19 states:

> "This standard of proof applies to all deportation cases regardless of the length of time the alien has resided in this country."

As of January 6, 1967, CFR 242.14 was amended to read as follows:

3. Petitioner's reliance on Miranda v. Arizona, 384 US 436, and Escobedo v. Illinois, 378 US 478, is misplaced, not only because they have no application to deportation proceedings, because of their civil nature, but also because petitioner was not in custody or other restraint when she gave the affidavit in question. She was fully advised that her statement must be made freely and voluntarily and that it could be used against her.

Statements given freely and voluntarily without any compelling influence are still admissible, even in criminal cases.

Miranda v. Arizona, supra at p. 478.

In addition, it should be noted that the Miranda doctrine applies only to cases tried after June 13, 1966, the date of the Supreme Court's decision in that case.

Johnson v. New Jersey, 384 US 719 (732-734).

Petitioner's hearing was held February 18, 1966.

"(a) Sufficiency. No deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."

32 Federal Register No. 6, January 11, 1967.

CONCLUSION

It is respectfully submitted:

1. Petitioner was accorded a fair hearing and due process.

2. The deportation order was found by clear, unequivocal and convincing evidence.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By: _____
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent

DATED: February 20, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

= =

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Respondent's Brief was served upon respondent by depositing the same in the United States mail at Main Post Office, Seventh and Mission Streets, San Francisco, California, addressed to:

Ralston L. Courtney, Esq.
Frame & Courtney
Post Office Box 895
Coalinga, California 93210
Attorneys for Petitioner.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

February 20, 1967.

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-13774062 - San Francisco JUL 7 - 1966

In re: NICOLE EUGENIE MARIE FARGUES

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ted R. Frame, Esq.
330 North Fifth Street
Coalinga, California 93210

ON BEHALF OF I&N SERVICE: John C. Williams
Trial Attorney
(Brief filed)

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 USC 1251 (a)(2)) - Entered without inspection

Lodged: None

APPLICATION: Remain in the United States

This case comes forward on appeal from an order entered by the special inquiry officer directing that the respondent be deported from the United States to France, the country designated by her, on the charge set forth in the Order to Show Cause. The respondent, a 33-year-old female, native and citizen of France, has resided continuously in the United States since last entering at or near Sumas, Washington on or about June 20, 1965, without documents and without being examined by an officer of the Service. Deportation proceedings were instituted against the respondent on February 10, 1966. A hearing in deportation proceedings was held at Fresno, California on February 18, 1966.

APPENDIX I

The respondent at the outset of the deportation hearing was apprised of her right to be represented by counsel or some other qualified person of her choice at her own expense. When the respondent was asked if she understood the questions, she answered in the affirmative. She was next asked if she wished to be represented or to go ahead with the hearing by herself. She replied that she understood that she had to have someone but whom she did not know. She was then advised that she could have a person represent her if she desired and she replied, "Oh, no." She was then advised that she could proceed with the hearing by herself without an attorney and she replied she was not rich enough to have an attorney. When asked if she wanted to go ahead with the proceeding by herself, she replied, "Yes." (p. 2) We find absolutely no merit to counsel's declaration that she did not intelligently and understandingly waive her right to counsel. Likewise, we find no basis for counsel's assertion that the respondent had no understanding of her rights. It is noted the respondent in answering some questions replied "Uh-huh" and in response to other questions she answered "Yes." The record shows that the respondent answered many of the questions propounded to her by the expression "Uh-huh." Uh-huh is an exclamation signifying an affirmative answer (Webster's New International Dictionary, p. 2753). We have carefully screened the entire record and we find nothing therein that in any manner supports counsel's assertion that the respondent did not intelligently and understandingly waive her right to counsel. On the contrary, we find that the respondent gave clear and intelligent answers to all the questions asked of her by the special inquiry officer during the deportation hearing and that she was fully aware of the nature of the proceeding.

The respondent admitted the truth of all the factual allegations set forth in the Order to Show Cause and conceded deportability on the charge stated therein. The respondent in a question and answer statement subscribed and sworn to before an officer of the Service on August 4, 1965 deposed among other things that she

entered the United States at or near Sumas, Washington on June 20, 1965 with one Gordon L. Kays, father of her infant child Daniel, born at Edmonds, Washington on August 2, 1965. The respondent further deposed that she was the wife of one Louis Farques, a French citizen, then living in Quebec, Canada. Her testimony shows that she had been living with Gordon L. Kays in a husband and wife relationship since her last arrival in the United States; that she met the aforementioned Gordon Kays when she was visiting in the United States approximately one year ago. She stated the Welfare Department in Fresno, California paid her way back to Canada in January 1965 and that her other son, Jean Farques, 15 years of age, is living with his father in Canada. The Service officer informed the respondent at the time she made the sworn statement on August 4, 1965 that said statement must be made freely and voluntarily; that it may be used against her or any other person in immigration and naturalization proceedings. After receiving such advice the respondent freely and voluntarily made the statement which was subscribed and sworn to by her on August 4, 1965. The record reveals that the respondent remembered signing the aforementioned statement (p. 16).

It is well established that a statement obtained from an alien who is not represented by counsel may, nevertheless, be admitted into evidence and considered. Likewise, it is well established that the strict law of evidence relating to judicial proceedings do not apply to administrative proceedings (Schoeps v. Carmichael, 177 F.2d 391; cert. den. 339 U.S. 914). Since deportation proceedings are civil in nature, we are not concerned with the rules of evidence which apply in criminal proceedings (U.S. ex rel. Bilokumsky v. Todd, 263 U.S. 149). An extrajudicial statement made by a party in a civil matter that he or she has done what is in issue is admissible as evidence to prove the fact in issue and an alien's admission made on the preliminary

investigation may be used in deportation proceedings as the basis of a finding that he or she is deportable (U.S. ex rel. Bilokumsky v. Todd, supra).

Counsel's assertion that the respondent was deprived of due process of law by not being informed of her privilege against self incrimination is without merit. Since deportation proceedings are civil in nature rather than criminal the doctrine enunciated in Escobedo v. State of Illinois, 378 U.S. 478, has no application to the instant case. Among the guarantees without which there would be an absence of procedural due process are reasonable notice, the right to examine witnesses, to testify, to present witnesses, and to be represented by counsel. To render a hearing unfair, the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process. The record before us clearly shows that all the elements deemed essential to due process are present in this case. The evidence of record clearly establishes that the respondent is subject to deportation under the provisions of Section 241(a)(2), in that, she entered the United States without inspection. The question of allowing her to remain in the United States until her interlocutory judgment of divorce from her husband in Canada filed on March 2, 1966 becomes final on January 4, 1967, so that she can marry Gordon Kay, the father of her infant son, is a matter for administrative consideration and determination by the Service. For the reasons hereinbefore set forth, the following order will be entered.

ORDER: It is ordered that the appeal be dismissed.

Wm. S. Ziemanski
Chairman